

**BOARD OF APPEALS
For
MONTGOMERY COUNTY**

Stella B. Werner Council Office Building
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Rockville, Maryland 20850
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Case No. S-1289-B

PETITION OF HCR MANOR CARE
(Hearing held April 10, 2002)

OPINION OF THE BOARD
Effective Date of Opinion: May 30, 2002

This proceeding is a petition pursuant to Section 59-G-2.37 of the Montgomery County Zoning Ordinance (Chapter 59, Mont. Co. Code 1994, as amended) (Nursing Home or Domiciliary Care Home). The Petitioner proposes the modification of an existing nursing home to enlarge a dining room by enclosing an existing patio.

Stacy P. Silber, Esquire represented HCR Manor Care. Testifying in support of the special exception site plan were David Lanning of HCR Manor Care and Michael Plitt of Macris, Hendricks and Glascock, engineer.

Martin Klauber, Esquire, The People's Counsel of Montgomery County, Maryland participated in the hearing of this case.

The subject property is Lot 1 in the Normandy Farms subdivision, located at 10714 Potomac Tennis Lane in the RE-2/TDR Zone.

Decision of the Board: Special Exception **Granted**, subject to the conditions enumerated below.

EVIDENCE PRESENTED

1. Based on Special Exception Case No. S-1289, adopted by the Board of Appeals in 1986, the Petitioner was allowed to construct a total of 253 beds, in two separate facilities, including a nursing facility containing 128 beds and an assisted living facility containing 125 beds.
2. Pursuant to a request by the Petitioner, Special Exception Case No. S-1289A, approved on August 4, 1993, reduced the size of the proposed assisted living facility from 125 beds to 52 beds, and increased the nursing facility from 128 to 172 beds. In 1998, the Board of Appeals approved Special Exception Case No. S-1289A, which increased the assisted living facility from 52 to 54 beds.

3. The Petitioner now requests permission to expand the existing dining room by 400 square feet to provide additional dining space for its existing residents. There is no change to the current operations as there is no increase in employees, hours of operation or residents under this request.
4. A traffic study is not required to satisfy Local Area Transportation Review to determine the adequacy of public facilities because the proposed modification is not generating any new trips.
5. Michael Plitt, testifying on behalf of the Petitioner, stated that the proposed modification conforms to all zoning regulations. Mr. Plitt also testified that the special exception site plan meets all the requirements for the Special Exception as enumerated in Sections 59-G-1.2.1, 59-G-1.21 and 59-G-2.37 of the Montgomery County Zoning Ordinance. Mr. Plitt testified that there are no non-inherent adverse effects associated with the requested modification.
6. Mr. Plitt additionally testified that the Petitioner is relying on the Maryland-National Capital Park and Planning Commission Technical Staff Recommendation, (Exhibit 15), as evidence of the subject modification's satisfaction of the specific criteria of Zoning Ordinance Sections 59-G-1.2.1, 59-G-1.21 and 59-G-2.37.
7. David Lanning, testifying on behalf of the Petitioner, stated that the enlargement of the existing dining room will provide additional dining space for current residents. Enclosing and incorporating part of the terrace into the dining room provides benefits year round. Even with the enclosure, an outdoor dining area will remain.
8. Given the minor nature of the requested modification, the Planning Board did not make a recommendation on the petition. The Technical Staff recommended approval of the proposed modification with conditions (Exhibit 15).

FINDINGS OF THE BOARD

Based on the binding testimony and the exhibits of record, the Board finds that the proposed Special Exception can be granted.

Sec. 59-G-1.2. Conditions for granting.

59-G-1.2.1. Standard for evaluation. *A special exception must not be granted absent the findings required by this Article. In making these findings, the Board of Appeals, Hearing Examiner, or District Council, as the case may be, must consider the inherent and non-inherent adverse effects of the use on nearby properties and the general neighborhood at the proposed location, irrespective of adverse effects the use might have if established elsewhere in the zone. Inherent adverse effects are the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations. Inherent adverse effects alone are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are physical and*

operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site. Non-inherent adverse effects, alone or in conjunction with the inherent effects, are a sufficient basis to deny a special exception.

The inherent adverse effects of a nursing home include scale, size of the addition, noise and traffic. The proposed modification is approximately 400 square feet in size on 9 acres. Its scale is in keeping with the existing buildings on the property. In this modification there is no increase in the operation of the existing use, therefore, noise or traffic associated with the existing use will not increase. The requested modification will not change the inherent effects of the use or its compatibility with the surrounding neighborhood. There are no non-inherent adverse effects of the proposal.

59-G-1.21. General conditions.

(a) *A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

(1) *Is a permissible special exception in the zone.*

The Board finds that the use is allowed in the RE-2/TDR zones.

(2) *Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.*

The Board finds that the use will continue to be in compliance with the standards and requirements for a nursing home found under Section 59-G-2.37 of the Zoning Ordinance.

(3) *Will be consistent with the general plan for the physical development of the District, including any master plan thereof adopted by the Commission. Any decision to grant or deny special exception must be consistent with an recommendation in an approved and adopted master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that the granting of a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.*

The Board finds that the subject property is covered by the 1980 Potomac Subregion master plan. The Master Plan supports the existing RE-2 Zone for the property and nursing homes are allowed by special exception in that zone.

- (4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions and number of similar uses.*

The Board finds that the proposed modification will be in harmony with the general character of the neighborhood when considering these criteria.

- (5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site irrespective of any adverse effects the use might have if established elsewhere in the zone.*

The Board finds that the modification of this existing use will not have a detrimental effect for any of these reasons.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

The Board finds that the proposed modification will not cause adverse effects with respect to any of these criteria.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

The Board finds that the proposed modification will not increase the number, intensity, and scope of the approved special exceptions in the area.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

The Board finds that the subject modification will not cause any of these effects.

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

The Board finds that the modification will not affect the provision of public services and facilities.

Section 59-G-2.37. Nursing home or domiciliary care home.

- (a) *A nursing home of any size, or a domiciliary care home for more than 16 residents (for 16 residents or less see "Group home") may be allowed if the board can find as prerequisites that:*

- (1) *The use will not adversely affect the present character or future development of the surrounding residential community due to bulk, traffic, noise, or number of residents;*

The Board finds that the proposed modification will not adversely affect the present character or future development of the surrounding community due to noise, number of residents or traffic generated by this use.

- (2) *The use will be housed in buildings architecturally compatible with other buildings in the surrounding neighborhood; and*

The Board finds that based on submitted information, the new dining room, as enlarged based on this modification, will be architecturally compatible with the existing use as well as other buildings in the surrounding neighborhood.

- (3) *The use will be adequately protected from noise, air pollution, and other potential dangers to the residents.*

The Board finds that the proposed modification will be adequately protected from noise, air pollution, and other potential dangers to the residents.

- (4) *The Board of Appeals may approve separate living quarters, including a dwelling unit, for a resident staff member within a nursing home or domiciliary care home.*

The Board finds this provision is not applicable.

- (b) *The following requirements must apply to a nursing home housing 5 patients or less:*

- (1) *The minimum lot area must be as stated for the applicable zone but in no case less than 7,500 square feet.*

- (2) *The minimum street frontage must be 50 feet.*
- (3) *Minimum setbacks, minimum green area, maximum coverage and maximum height are those prescribed in these regulations for the zone.*

The Board finds that this provision is not applicable.

- (c) *The following requirements apply to all new nursing homes, additions to existing nursing homes where the total number of residents is 6 or more, and to all domiciliary care homes or more than 16 residents.*

- (1) *The minimum lot area in the rural zone must be 5 acres or 2,000 square feet per bed, whichever is greater.*

The Board finds that this provision is not applicable.

- (2) *In all other zones, the minimum lot area must be 2 acres or the following, whichever is greater:*
 - a. *In the RE-2, RE-2C, RE-1 and R-200 zones, 1,200 square feet for each bed.*

The Board finds that the subject site contains approximately 9.0 acres of RE-2 zoned land which satisfies the requirements for the minimum lot area and for the square footage per bed.

- (3) *Minimum side yards are those specified in the zone, but in no case less than 20 feet.*

The Board finds that the proposed modification satisfies this requirement.

- (4) *Maximum coverage, minimum lot frontage, minimum green area, minimum front and rear yards and maximum height, are as specified in the applicable zone.*

The Board finds that in the RE-2 Zone, the minimum lot frontage is 25 feet and maximum height is 50 feet. The site has approximately 300 feet of frontage on Potomac Tennis Lane and the buildings are 32 feet in height or 2 stories. The maximum coverage for the zone is 25%, under this request the coverage will be 20%.

- (d) *Off-street parking must be provided in the amount of one space for every 4 beds and one space for 2 employees on the largest work shift, except the board may specify additional off-street parking spaces where the method of operation or type of care to be provided indicates an increase will be needed.*

The Board finds that the proposed modification meets this requirement.

- (e) *An application must be accompanied by a site plan, drawn to scale, showing the location of the building or buildings, parking areas, landscaping, screening, access roads, height of buildings, topography, and the location of sewers, water lines, and other utility lines. The site plan must also show property lines, streets, and existing buildings within 100 feet of the property, and indicate the proposed routes of ingress and egress for automobiles and service vehicles. A vicinity map showing major thoroughfares and current zone boundaries within one mile of the proposed home, must be included.*

The Board finds that this requirement has been satisfied.

- (f) *An application for a special exception for this use must include an expansion plan showing the location and form of any expansions expected to be made in the future on the same site.*

The Board finds that there is no future expansion planned for this use.

- (g) *Any nursing home, or domiciliary care home for more than 16 residents lawfully established prior to November 22, 1977, is not a nonconforming use, and may be extended, enlarged or modified by special exception subject to the provisions set forth in this section.*

The Board finds that this provision is not applicable.

- (h) *Any application for nursing home and/or care home which is pending at the Board of Appeals as of February 24, 1997 at the request of the applicant, may be processed under the applicable provisions of the Zoning Ordinance in effect at the time the application was filed.*

The Board finds that this provision is not applicable.

Accordingly, the Board grants the requested modification subject to the following conditions:

1. The Petitioner shall be bound by all testimony and exhibits of record, the testimony of witnesses and representations of counsel, to the extent that such evidence and representations are identified in the Board's opinion granting this modification.
2. All terms of the existing Special Exception shall remain in effect, except as modified herein.

On a Motion by Allison Ishihara Fultz, seconded by Angelo M. Caputo, with Louise L Mayer, Donna L. Barron and Donald H. Spence, Jr., Chairman in agreement, the Board adopted the following resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the Opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled petition.



Donald H. Spence, Jr., Chairman
Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 30th day of May, 2002.



Katherine Freeman
Executive Secretary to the Board

NOTE:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date of the Opinion is mailed and entered into the Opinion Book (see Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County in accordance with the Maryland Rules of Procedure.

See Section 59-A-4.53 of the Zoning Ordinance regarding the twenty-four-month period within which the special exception site plan granted by the Board must be exercised.

See Section 59-A-3.22 of the Montgomery County Zoning Ordinance regarding Use and Occupancy Permits for a special exception site plan.

The Board shall cause a copy of this Opinion to be recorded among the Land Records of Montgomery County.

